REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 461 OF 2014

REPUBLIC……………………………………………………………..APPLICANT

VERSUS

THE NAIROBI CITY COUNTY…………………………………..RESPONDENT

EX PARTE

SENCO LIMITED

W.H.E. EDGLEY'S TRUST TRUSTEES REGISTERED

JUDGEMENT

1. Through the Notice of Motion Application dated 18th December, 2014, the ex parte applicants, Senco Limited and W.H.E. Edgley's Trust Trustees Registered pray for orders that:

"1. An Order of Certiorari to remove into the High Court for purposes of it being quashed the decision made by the Nairobi City County dated 18th September, 2014 to charge the Applicants' land L.R. 209/3324 with land rates.

2. An Order of Mandamus to compel the Respondent to issue a rates clearance certificate.

3. An Order of Prohibition to prohibit the Respondent – the Nairobi City County, from raising, demanding, charging or levying land rates on L.R. 209/3324.

4. THAT all necessary and consequential orders or directions be given.

5. THAT the costs of this application be provided."

2. The Respondent is the Nairobi City County.

3. From the papers filed in court it emerges that the 1st Applicant is the registered owner of L.R. No. 209/3324 ("the property") located in Nairobi. The 2nd Applicant is the intended transferee of the property.

4. The property has since 1958 been used for educational purposes. The educational institute is known as Kenton College Preparatory School.

5. According to the applicants, since the property is used as an educational institution, it is by virtue of sections 2 and 27(1)(d) of the Valuation for Rating Act, Cap 266 ("the Act") exempted from valuation for the purpose of payment of rates. Further, that the Respondent acknowledged that the property is not rateable as per Section 27(1)(d) of the Act through a consent order entered between it and the 1st Applicant in **Nairobi Magistrates' Court Civil Case No. 834 of 1984 City Council of Nairobi v Senco Ltd** and **Nairobi Magistrates' Court Civil Case No. 1046 of 1991: City Council of Nairobi v Senco Limited.**

6. It is the applicants' case that the Respondent through a letter dated 25th February, 2014 actually acknowledged that the property was not rateable. However, through a letter dated 18th September, 2014 the Respondent refused to issue a rates clearance certificate stating that the property is not exempt from payment of rates. Through the same letter, the Respondent demanded that the rates due amounting to Kshs. 379,385,218/= be paid.

7. The applicants assert that the charging and demanding of rates on the property by the Respondent is in breach of Section 27(1)(d) of the Act, in disobedience of a court order and contrary to the applicants' legitimate expectations.

8. The Respondent opposed the application through the replying affidavit and supplementary affidavit sworn by the Acting Assistant Chief Accountant Benard Njau Njehia on 24th February, 2015 and 3rd March, 2015 respectively. From the affidavits and the submissions filed by the Respondent, the Respondent opposes the application firstly, on the ground that judicial review is not available in the circumstances of this case as the applicants' case is targeted at the merits of the decision and not the process leading to the making of the decision.

9. Secondly, it is the Respondent's case that this matter is *res judicata*, as the same was the subject of litigation in **CMCC No. 834 of 1984** and **CMCC No. 1046 of 1993** which were settled by consent. It is therefore the Respondent's case that these proceedings amount to abuse of the court process.

10. Thirdly, the Respondent asserts that even though Section 27(1)(d) of the Act exempts certain entities from paying rates, the exemption does not extend to the 1st Applicant's property by virtue of the proviso which excludes profit-making entities from the exemption. The Respondent contends that the suit property has at all material times been used as a commercial college whose students register and train at a fee.

11. Further, that Legal Notice Nos. 389 of 1990 and 390 of 1990 related to charitable institutions of which the 1st Applicant is not one. Also, that the said legal notices were, in any case, revoked by Legal Notice No. 179 of 1997.

12. Fourthly, the Respondent asserts that the letters used to show that it had conceded to the Applicant's position are not properly on record as they were not addressed to the Applicant.

13. Are these proceedings *res judicata*? The consent order as transmitted to the Resident Magistrate by the advocates of the Plaintiff and the Defendant in **Nairobi (City Council) 1st Class Magistrate's Court Civil suit No. 1046 of 1996 City Council of Nairobi v Sencon Limited** was couched in the following words:

> **"By consent the suit to be marked settled with no order as to costs it being agreed that the land is not rateable by virtue of S. 27 (1) of the Valuation for Rating Act Cap. 266 and the Exemption in Legal Notice Nos. 389 and 390 of 1990."**

14. If the consent was solely grounded on Legal Notice Nos. 389 of 1990 and 390 of 1990 then one can say that the said order became obsolete by virtue of the revocation of those two legal notices by Legal Notice No. 179 of 1997. It is, however, noted that the consent was also based on Section

27(1) of the Act. Section 27(1) has not changed from the time the consent was entered in 1994. In fact the proviso which the Respondent is attempting to rely on was inserted by Act No. 11 of 1992 about two years prior to the recording of consent.

15. It is the Respondent's case that in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** the Court of Appeal concluded that in order for the principle of *res judicata* to apply, the conditions to be met are:

a. There must be a previous suit in which the matter was in issue;
b. The parties were the same or litigating under the same title;
c. A competent court heard the matter in issue; and
d. The issue had been raised once again in a fresh suit.

16. Counsel for the applicants submitted that a plea of *res judicata* may not be available in public law. This argument is not without reason. H. W. R. Wade & C. F. Forsyth in the 10th Edition of their book, **Administrative Law** at page 204, discusses the doctrine of *res judicata* as follows:

"One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgement are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision."

17. At pages 209 to 210 the authors suggest that a plea of *res judicata* is restricted in public law. They state that:

"It is probable that the doctrine of res judicata is inherently inapplicable to proceedings for habeas corpus, certiorari and the other prerogative remedies. Formerly there were grounds for holding that the court's rulings in such cases were not technically judgments capable of producing res judicata. A more persuasive reason is that in these procedures the court 'is not finally determining the validity of the tribunal's order as between parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not'. They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown, and may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of the legal process, and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds."

18. Therefore, in judicial review proceedings the Court has to be very keen when a plea of *res judicata* is raised least a deserving applicant is denied a public law remedy. However, as noted by the said authors, a plea of *res judicata* is indeed available in public law.

19. In **Willie v Muchuki & 2 others [2004] 2 KLR 357,** Kimaru, J cited the decision of Bosire, J (as he then was) in the case of **Caltex Oil (Kenya) Ltd v Mohamed Yusuf and others, Nairobi HCCC No. 1322 of 1993** where the principles underpinning a successful invocation of *res judicata* were enunciated as follows:

"**The third and the last issue is one of *res judicata*. The doctrine is provided for under section 7 of the Civil Procedure Act. For the doctrine to apply three basic conditions must be satisfied. The party relying on it must firstly, show that there was a former suit or proceeding in which the same parties as in the subsequent suit litigated. Secondly, the matter in issue in the latter suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in that former suit**."

20. In the case before me, the parties are agreed that they had previously litigated before the Magistrate's Court on the question as to whether the 1st Applicant's property was exempted from payment of rates. That litigation resulted in the recording of a consent which remains unvaried and binding on the parties to date. The parties do not dispute the fact that the said consent order was reached before a court of competent jurisdiction. Therefore, by virtue of the consent dated 8th April, 1994 the Respondent herein is to date barred from collecting rates in respect to the 1st Applicant's property.
21. From what I have stated above, it is clear that the Respondent's plea that this matter is *res judicata* is valid. I therefore find that this matter is indeed *res judicata*. Having reached this conclusion, I do not need to address the core issue namely whether the 1st Applicant's property is by virtue of Section 27(1)(d) of the Act exempted from payment of rates.
22. Fortunately for the parties, they chose to answer the question for themselves through their consent dated 8th April, 1994. Although the legal notices referred to in the consent have since been revoked, Section 27(1) of the Act remains unchanged thus making the consent legal to date. The Respondent cannot run away from that consent.
23. The end result is that the Applicant's case is dismissed. However, this litigation would not have been necessary had the Respondent complied with the consent dated 8th April, 1994 and issued a Rates Clearance Certificate in respect of the 1st Applicant's parcel of land. For this reason, the Respondent is condemned to pay the applicants' costs in respect of these proceedings

Dated, signed and delivered at Nairobi this 5th day of Nov., 2015

W. KORIR,

JUDGE OF THE HIGH COURT